



CITY OF OAK HARBOR

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Oak Harbor, Washington 98277-4092

Department of Ecology
Water Quality Program
AUG 19 2005

August 18, 2005

Western Washington Municipal SW Comment
Bill Moore
WA Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Draft Comments for Oak Harbor

Dear Mr. Moore:

This letter is written as a solicited response to the Department of Ecology's Draft of NPDES Phase II permit requirements. The City of Oak Harbor is considered to be a bubble city in the draft and is considered to be triggered for NPDES Phase II regulation through Criterion Number 1 and Criterion Number 2. Although the City remains unconvinced that the designation criteria of shellfish beds, potential bull trout habitat, and adjacent Navy Base is justifiable, it is providing comments on the draft permit language.

The reasons that the City believes the designation criteria is unjustified are provided in the next 3 paragraphs. Below these paragraphs, are comments addressing the draft permit requirements.

Designation Criteria

Criterion Number 1 labels Oak Harbor as a "sensitive water" due to shellfish beds and proposed bull trout critical habitat. Oak Harbor shellfish beds are closed due to the City's sewage outfall. According to the State Department of Health this is due to a federal sewage outfall requirement and enforced through the DOE. It is not due to existing impaired water quality, but rather a standard protection measure. This means that regardless of stormwater quality, the shellfish beds will remain closed. In addition, the silty soil type found in Oak Harbor inhibits shellfish harvesting due to its pedestrian unfriendly properties.

This leaves the second "sensitive water" trigger. It is understood that bull trout is a threatened species protected under the Federal Endangered Species Act, yet a final decision on the proposed critical habitat has not yet been made. Until this decision is made, it should not be counted as an absolute trigger criterion.

Criterion Number 2 is considered to be satisfied by the DOE by the presence of Naval Air Station (NAS) Whidbey. It is the City's understanding that we do not have regulatory authority over discharge from the Naval base, and that the federal government through the EPA is the regulating agency for military bases. The City does not agree that it should be made responsible for a Federal Military facility.

Draft Comments

I have attached comments prepared by the American Public Works Association (APWA) and the Association of Washington Cities (AWC) that address the draft requirements. The City of Oak Harbor strongly endorses these comments. The monitoring and reporting requirements are of particular concern. Assessing BMP appropriateness is a task better suited to a larger agency more specifically focused on water quality such as the DOE. This requirement appears to be pushing the Cities into the research arena. In addition, the requirement to track expenditures, enforcement actions, inspections, education activities, and monitoring data to the detail implied in the draft will create an unfair burden upon our municipality.

Some other requirements that I would like to mention as being unreasonable are the requirement to actively detect illicit discharges and to provide stormwater mapping in a GIS format. Active illicit discharge detection requires staff to "play detective" pursuing infractions that may not exist. Maintenance staff already perform illicit discharge detection in their routine maintenance procedures. The GIS requirement requires a level of mapping that is expensive and is not planned to be obtained by the City of Oak Harbor.

To summarize, the draft permit will require a level of commitment of resources that is not achievable for small municipalities such as ours and needs to be reduced in scope.

If you have any questions or would like to discuss this further, please contact me at (360) 279-4526.

Sincerely,

A handwritten signature in cursive script, reading "Brad Gluth".

Brad Gluth,
Project Engineer
Development Services Department

Cc: File

APWA Stormwater Manager Phase II Comments July 15, 2005

- 1) Jurisdictions uniformly agree that the DOE should not attempt to conduct research on BMP effectiveness on the backs of permittees. A better option would be for DOE to contract with an independent third party to conduct such evaluations. An advisory committee consisting of jurisdictions should be formed to help decide what BMP's need further evaluation above and beyond that already done by others locally as well as nationally. As a means to fund this effort, a surcharge could be placed on all permittees. While this may sound expensive, it would be far cheaper to do thus than ask each jurisdiction to do their own "wet chemistry". Further, it was the feeling of the group that QA/QC would be much better and the results applicable across a wider range of watersheds.
- 2) Jurisdictions object to DOE "pushing down" their responsibility to identify facilities needing NPDES permits. This is not our obligation.
- 3) Jurisdictions feel strongly that the DOE needs to be adequately staffed with trained personnel capable of reviewing and approving any submittals for NPDES permits. Collecting a fee but being unable to review alternative manuals, annual reports, maps, etc., is unacceptable. There is no certainty or liability shield as minimal as it may be as proposed in the permits and presentations by DOE staff.
- 4) Coordination with other jurisdictions should be encouraged but not a permit requirement. Watershed planning efforts have shown how difficult and, in many cases, impossible this is to accomplish.
- 5) Utilization of forested conditions as a pre-developed condition for redevelopment causes jurisdictions extensive legal liability for a takings claims. Each jurisdiction should ask their legal staff to review this section. There is no nexus between the proposed action and the amount of mitigation required. This is a huge issue.
- 6) Requiring jurisdictions to view conversion of hardened surfaces such as gravel roads used for many years to asphalt as "new construction" will result in fewer roads being converted and remaining substandard for the traveling public. Further, converting gravel shoulders to paved has the same issues. Similar issue as the pre-forested conditions issue.
- 7) The current definition of new discharge and its apparent certification by the local jurisdiction for new developments not causing water quality standards exceedences even after application of the Ecology Manual causes many concerns. Who is liable if an exceedence occurs after development is approved and built?

8) The current proposal in the permit to require new developments to use the DOE Manual (or equivalent) within a short period of time after adoption ignores state vesting laws. This creates an automatic violation of the permit if vesting laws are followed; if not, then it creates an automatic violation of state laws...either way we get sued and lose.

9) The current phase II permit appears to shift from a technology based permit to a standards based one contrary to what was agreed to by the DOE and the Westside Stormwater Committee in 2003.

10) The deadlines are unreasonable for the majority of the Phase II permittees and the Phase I deadlines are difficult at best to achieve with no net benefits to the environment. Further, the number of submittals and types of reports needed appear to be mainly busy work or for no known reason and outside the CWA obligations.

11) The requirement to submit all data in GIS formats conforming to the State's standards is unworkable. Many smaller jurisdictions do not have GIS systems and for those that do, making the data available on their web site would be adequate and not require extensive efforts.

12) Monitoring should only be focused on the program elements. If DOE wants monitoring for other things, see #1 above. Compliance monitoring of permit commitments appears to be reasonable, standards monitoring is not.

Mr. Jay Manning, Director
Washington State Department of Ecology (DOE)
P.O. Box 47600
Olympia, WA 98504-7600

RE: NPDES Phase II Stormwater Permit – Concerns with draft permit and rule, and request for meeting in advance of Aug. 19 to discuss options and alternatives

Dear Mr. Manning:

We write on behalf of the cities and counties in our Associations required to adopt Phase II NPDES permits under the Federal Clean Water Act. We appreciate the considerable work the Department of Ecology has put into the draft requirements for NPDES Phase II permits. However, there are numerous concerns, so we are asking that you and appropriate Ecology staff meet with a group of us in advance of the August 19 comment deadline to explore options and alternatives to some items in the current preliminary draft.

First, let us underscore that Phase II cities and counties feel strongly about having a Phase II permit that offers them coverage and legal certainty regarding stormwater, and gives them guidance to help meet environmental stewardship responsibilities. We want to see the permit finalized – sooner rather than later. At the same time, Phase II jurisdictions do not believe the permit is workable in its current form, and believe it is critical that we develop mutually acceptable options. Without delving into minutiae, here are our major concerns:

Monitoring: The draft permit proposes to require the 85 Western Washington Phase II jurisdictions develop comprehensive stormwater monitoring plans, and do so in a way that demonstrates the Ecology manual, BMPs, and approaches to stormwater discharges will result in improvements to water quality and overall environment. The cost implications of this requirement are enormous, and the expectation of what is to be achieved is simply beyond what we consider reasonable. There are simply too many variables and factors that affect environmental conditions – involving non-point sources and other things beyond our control -- for us to specifically measure how stormwater programs and BMPs are improving water quality. We would like to present an alternative monitoring plan that is more achievable, with programmatic and adaptive management features that can be more easily measured.

Pre-development, forested conditions – and legal ‘takings’ concerns: Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We have consulted with City Attorneys and County Prosecuting Attorneys who strongly believe that mitigation requirements outlined in the draft permit would leave jurisdictions very vulnerable to “takings” claims. Specifically, attorneys have cited the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General’s Office that reads in part,

“...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.”

“New discharge” definition: Language in the permit seems to imply that *any* change to an existing outfall – even replacing a culvert to comply with Washington Department of Fish and Wildlife guidelines – is to be defined as a “new discharge.” Additionally, the permit requires application of the DOE Manual or equivalent. This would require changes to plans in the review process. This would appear to fly in the face of vesting laws, and would place major burdens on our jurisdictions. We would like to discuss language modifications to clarify that replacement of failing or inadequate outfalls does not qualify as a ‘new’ stormwater discharge and that recognizes state vesting laws.

Deadlines that are unattainable: The Phase II permit as drafted contains a wide array of adoption deadlines and inspection frequencies, many of them within one year. These will be difficult to impossible to achieve, particularly for the smaller Phase II jurisdictions that do not yet have a formal stormwater program.

Testing and reporting requirements: If DOE wants all existing BMPs subjected to testing, we believe the Department should bear the cost and responsibility for that testing, not counties and cities. We also are concerned that the reporting requirements in the draft permit will be too burdensome – particularly for smaller jurisdictions – and that annual reporting of things such as expenditures is a subjective measurement that doesn’t improve the environment or stormwater programs in general. We would like to explore other options for frequency and content of reporting requirements.

Assumptions regarding adoption of the DOE stormwater manual: The Phase II draft makes the tacit assumption that jurisdictions should adopt the DOE stormwater manual as Best Available Science (BAS). The manual – which was intended to be used for guidance only and not as a requirement – contains a number of conditions that are of serious concern to jurisdictions. For example, it classifies replacement and maintenance actions of already-impervious surfaces, including roads, as redevelopment. In addition, there is concern that the option to adopt an equivalent manual that recognizes municipality-specific conditions is not provided in Phase II as it is in Phase I.

Fiscal, liability, and staffing concerns: We are concerned that Phase II jurisdictions will be paying new permit fees, and yet Ecology will not have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the “coverage” that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If standards are too high, and administrative review and protection is haphazard, *our* liability exposure is actually *increased*, rather than *reduced*, as was intended.

Overall, the Draft Phase II permit appears to go well beyond the six mandatory minimum EPA guidelines “+ 2” agreement that local jurisdictions and DOE agreed to through the advisory committee process in late 2003. It also goes beyond what has been adopted in many other states which do not require any monitoring element (other than evaluation of program compliance) for Phase II jurisdictions. As such, we are very concerned about costs, unfunded mandates, practicability, and legal ‘takings’ issues.

Therefore, we ask for time with you and senior staff in advance of August 19 to meet and begin the work of exploring mutually acceptable alternatives. We will be in touch with your office so on to schedule the meeting. Once again, we would like to express our appreciation for Ecology's work to date on this important issue.

Sincerely,

Dave Williams
Staff Associate
Association of Washington Cities
Counties

Paul Parker
Assistant Executive Director
Washington State Association of

cc: Bill Moore, Department of Ecology